

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
3                   AT CHARLESTON

4                   TRANSCRIPT OF PROCEEDINGS

5 -----x  
6                   :                   CIVIL ACTION  
7   IN RE:  DIGITEK PRODUCT       :                   NO. 2:08-MD-01968  
8   LIABILITY LITIGATION         :                   August 11, 2009  
9 -----x

10                   MOTIONS HEARING

11  
12                   BEFORE THE HONORABLE MARY E. STANLEY  
13                   UNITED STATES MAGISTRATE JUDGE

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15                   APPEARANCES:

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22 Court Reporter: Lisa A. Cook, RPR-RMR-CRR-FCRR

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24 Proceedings recorded by mechanical stenography; transcript  
produced by computer.

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1                                    P R O C E E D I N G S

2                    THE COURT: Good morning again.

3                    This is *In Re: Digitek Product Liability*, Case Number  
4                    2:08-MD-1968.

5                    Will the attorneys please note their appearances for  
6                    the record.

7                    MR. FRANKOVITCH: For the Plaintiffs' Steering  
8                    Committee, Carl Frankovitch.

9                    MR. BELL: For the Plaintiffs' Steering Committee,  
10                    Harry Bell.

11                    MS. CARTER: For the plaintiffs, Meghan Carter.

12                    MR. MORIARTY: Matthew Moriarty for the Actavis  
13                    defendants.

14                    MS. BETTS: Rebecca Betts, defendants' liaison  
15                    counsel.

16                    MR. KAPLAN: Harvey Kaplan for the defendant,  
17                    Mylan defendants.

18                    THE COURT: Thank you.

19                    The, the Court scheduled oral argument concerning the  
20                    defendant's motion to determine the sufficiency of the  
21                    objections to the Requests for Admission which the defense  
22                    wishes, and I take it it's all defendants, wish to serve on  
23                    some not yet identified plaintiffs' attorneys.

24                    Now, the first assertion made by the plaintiffs is that  
25                    this kind of discovery is not timely under Pre-Trial Order

1 16.

2 Is there -- now, who's going to be addressing all this  
3 for the plaintiffs?

4 MR. FRANKOVITCH: I can, Your Honor.

5 THE COURT: All right, Mr. Frankovitch. The -- do  
6 you agree, Mr. Frankovitch, that there is nothing in the  
7 Pre-Trial Order 16 that prohibits this discovery?

8 MR. FRANKOVITCH: Your Honor, our position was, is  
9 that the whole concept of the MDL was to bring these cases  
10 together and to do the, the, what I'll call the generic  
11 discovery for all of the cases which would then be remanded  
12 back to the, to the respective districts for trial, and that  
13 the whole concept is that individual discovery on the cases,  
14 except for those that are selected in the trial pool here,  
15 would be deferred until such time as the, the MDL completed  
16 its work here.

17 THE COURT: So, you're saying it violates the  
18 spirit, not the letter, of the Pre-Trial Order 16.

19 MR. FRANKOVITCH: Correct, yes.

20 THE COURT: Let me direct your attention to  
21 Pre-Trial Order 22.

22 MR. FRANKOVITCH: Okay, Your Honor.

23 THE COURT: Page 13, Section R.

24 MR. FRANKOVITCH: Yes, Your Honor. The --

25 THE COURT: Would you address whether that

1 effectively answers that, --

2 MR. FRANKOVITCH: I don't think it does --

3 THE COURT: -- that argument?

4 MR. FRANKOVITCH: -- because I don't think it's  
5 contemplated by either party that any of the individual  
6 defendants, the individual plaintiffs could initiate  
7 discovery on their own behalf to make any type of discovery  
8 of the defendants. It would all have to be done through the  
9 PSC at this juncture.

10 THE COURT: So, you're saying what's good for the  
11 goose is what's good for the gander, or whatever the cliché  
12 is.

13 MR. FRANKOVITCH: Whether it's explicit or not,  
14 the understanding is -- my understanding, at least, when the  
15 cases go to the MDL, they're, they're set there, they're  
16 sent there for the purposes of discovery and to coordinate  
17 the discovery generically, and then for the cases to be  
18 remanded back to their districts so that there isn't this  
19 individual discovery going on and the defendants are not  
20 inundated with 400 sets of interrogatories or 400 Requests  
21 for Admissions on their part.

22 THE COURT: Right.

23 MR. FRANKOVITCH: And that's, that's the whole  
24 idea of getting here. And to start the discovery  
25 individually defeats the purpose.

1           THE COURT: But isn't there a theme underlying  
2     your argument that Rule 11 doesn't apply in mass tort  
3     litigation?

4           MR. FRANKOVITCH: Well, I don't know that it  
5     doesn't apply. It doesn't, it doesn't get triggered at this  
6     stage of the litigation. Even if the, if the Court were to  
7     order that you admit that you didn't have the medical  
8     records before you filed the suit, you still would have  
9     collateral issues that would have to be, go through  
10    discovery to flesh out whether there was other information  
11    that they had and other reasons that the case was filed.

12          So, I don't think it's dispositive just because it's 11  
13    because I think 11 opens up another host of discovery. It's  
14    another collateral issue that has to be discovered in each  
15    individual case. And it's really premature because you  
16    could have, in this instance, somebody who didn't have a  
17    medical record when they filed and they have a perfectly  
18    good case.

19          THE COURT: Well, presumably the best argument  
20    that can be made for such an attorney is that they had to  
21    file at the last minute because of the statute of  
22    limitations. And perhaps even before service was  
23    accomplished, they then had the evidentiary support for  
24    their claim. Is that fair?

25          MR. FRANKOVITCH: That, that's fair too. The

1 other aspect of this is the, the plaintiffs asked for a  
2 tolling agreement. And the defendants' position was, "File  
3 it. We don't want to do a tolling agreement." A tolling  
4 agreement -- just put everything on the side with the  
5 understanding that they would answer plaintiff fact sheets.  
6 We said, "Just go ahead and file them," which people did.  
7 Many filed before that discussion even took place  
8 conceivably.

9 So, it really -- I don't think that it, it adversely  
10 affects the, the light in which the plaintiff's attorney  
11 acted, the fact that they didn't have the record at the  
12 time because you have -- we were talking -- you could  
13 have an instance where a plaintiff said, comes in and  
14 said -- aside from the statute problem, which the statute  
15 problem I think is clearly an exception by itself on an  
16 individual case basis. But they could have other  
17 evidence besides the medical records which can establish a  
18 case.

19 So, I don't, I don't think that it's -- and then once  
20 you start down that path, you're, you're opening up each  
21 individual case for those kind of issues, and it becomes  
22 separate discovery very early on as to whether you have a  
23 viable case.

24 THE COURT: Well, so far we have before the Court  
25 three Requests for Admissions that are supposed to go to

1 less, fewer than 40. It's actually fewer than 40 cases. We  
2 don't know how many attorneys are involved, do we?

3 MR. FRANKOVITCH: The defendants may know that.

4 THE COURT: How many attorneys do we have involved  
5 in this, Mr. Moriarty?

6 MR. MORIARTY: I'm sorry, Your Honor, I couldn't  
7 tell you that off the top of my head. There could be 39  
8 different ones, or there could be some clusters. I just  
9 don't know. I could find out for you pretty quickly.

10 THE COURT: All right.

11 Now -- well, Mr. Frankovitch, I'm trying to understand  
12 how the plaintiffs can argue that these Requests for  
13 Admissions are not proper discovery. I have read in the  
14 memo that it's not reasonably calculated to lead to  
15 discovery of admissible evidence, and that it doesn't lead  
16 to evidence of the plaintiffs' claims.

17 MR. FRANKOVITCH: Right.

18 THE COURT: Rule 26 defines relevancy for the  
19 purpose of discovery as relating to a claim or a defense.  
20 And it appears to me that the requests definitely, and  
21 perhaps primarily, go to evidence of a defense. And would  
22 you agree that the lack of records --

23 MR. FRANKOVITCH: No.

24 THE COURT: -- when filing a complaint goes,  
25 certainly is indicative of a potential defense for the

1 defendants?

2 MR. FRANKOVITCH: I, I don't think so. I mean, if  
3 the records are available, the records would speak for  
4 themselves as to whether they support or don't support the  
5 claim. I don't, I don't think it goes to the merits of the  
6 claim. It goes to the merits of a Rule 11 claim --

7 THE COURT: Uh-huh.

8 MR. FRANKOVITCH: -- after the case is disposed of  
9 and there's a determination as to whether the case should  
10 have been filed or not.

11 THE COURT: Now, the -- so, you're saying that the  
12 case has to go through the entire process before we decide  
13 whether or not a Rule 11 proceeding is appropriate?

14 MR. FRANKOVITCH: I, I think you have to make a  
15 determination whether it's a frivolous claim. And the only  
16 way you would make that determination is when you complete  
17 the case and see that there either is or isn't sufficient  
18 evidence for the, for the case.

19 THE COURT: Frivolousness is typically an issue  
20 that is tried to be determined at the beginning so the  
21 people don't waste a lot of time and energy on the case. I  
22 don't understand how it makes any sense to decide that  
23 something is frivolous at the far end as opposed to the  
24 front end.

25 MR. FRANKOVITCH: Well, I don't know -- I don't

1 think by itself whether you have medical records determines  
2 whether a claim is frivolous or not. You can have a very  
3 viable claim without, without having had the medical  
4 records. You know, you may need them at some point in the  
5 litigation, but you don't have -- that's not a predicate to  
6 filing the case.

7 THE COURT: Can you describe a case like that to  
8 me, please?

9 MR. FRANKOVITCH: Sure. You have an instance  
10 where a plaintiff comes in, let's say a surviving spouse  
11 said, "I took my husband to the emergency room and they told  
12 me that he had a high digitalis." And the attorney says,  
13 "Are you sure that's what they said?" "Yes, I'm sure."

14 And he calls the doctor and says, "Did this person come  
15 in and have high digitalis?" And the doctor says, "Yes, he  
16 did." And he goes ahead and files the case.

17 Now, ultimately you'd expect that he would have the  
18 medical records. And at some stage, you would get the  
19 medical records.

20 THE COURT: Right. And, of course -- I was  
21 wondering if, if you were arguing that there would be a  
22 viable case without any medical records at all.

23 MR. FRANKOVITCH: Probably not. At some point,  
24 you, you would have to have medical records. You'd probably  
25 have to have employment records. You'd have, you know, the

1 typical stuff that you'd use in a, in proving damages and  
2 causation.

3 THE COURT: Are you seriously pursuing the claim  
4 that these Requests for Admission infringe upon the  
5 attorney/client privilege or the work product protection?

6 MR. FRANKOVITCH: I, I hadn't thought about it in  
7 that sense. The bigger position from the PSC was that it  
8 defeats the, the purpose and the function of the MDL because  
9 it opens up this collateral issue on all the individual  
10 cases.

11 THE COURT: Well, I'm glad that you, you raise  
12 that because the Court's involvement in mass tort litigation  
13 has, has given some sense of a pattern, which is that there  
14 is an incident or a recall or black box warning or  
15 something. Cases are filed.

16 My guess is that there are very credible meritorious  
17 cases within those cases, but there also are a mass of other  
18 cases. And they end up being grouped together and settled  
19 for a nominal amount like \$100, less than a filing fee.

20 And I -- it strikes me that if an attorney files a  
21 lawsuit without having performed the kind of investigation  
22 as to whether a claim has evidentiary support with the  
23 expectation that the attorney is assuming that a certain  
24 number of the cases filed will simply qualify for a  
25 settlement of a hundred bucks, then that, that means that

1 Rule 11 has basically no applicability, no utility in a mass  
2 tort context.

3 Nobody in their right mind files a lawsuit with the  
4 expectation of \$100 unless there is a mechanism for that  
5 attorney to actually make a profit because of grouping the  
6 plaintiffs together or filing class action and putting a lot  
7 of plaintiffs into it. And I cannot believe that MDL and  
8 mass tort litigation intended that result.

9 So, this judicial officer believes that Rule 11 is  
10 alive and well and should apply and, to attorneys who are  
11 participating in mass tort litigation.

12 Now, I would like to know what's wrong with my  
13 reasoning.

14 MR. FRANKOVITCH: I -- it's hard to disagree with  
15 you other than the fact that most, not most, all attorneys  
16 wouldn't file with the expectation they're going to get \$100  
17 when the filing fee costs them more.

18 THE COURT: Exactly.

19 MR. FRANKOVITCH: That doesn't -- nobody has that  
20 goal in mind when they file their case. And I guess you  
21 have to look at that motivation too, you know, when you're  
22 looking at whether there would be sanctions appropriate or  
23 not.

24 THE COURT: Uh-huh.

25 MR. FRANKOVITCH: But I think, you know, the --

1 and I don't disagree that that occurs. People just gather  
2 up cases and start filing them without regard to whether  
3 there's underlying merits to the cases.

4 But as, as the Court knows, I mean, as cases develop,  
5 you find cases that are good and cases that are bad, for  
6 whatever reason, through the discovery process.

7 THE COURT: Sure.

8 MR. FRANKOVITCH: And they weed themselves out.  
9 And I'm sure that many of these cases, as this case  
10 progresses, will weed out as they go. That doesn't -- the  
11 fundamental problem that I see is getting into this issue at  
12 this stage individually with each case.

13 THE COURT: And what is your thought as to when it  
14 should be examined? I mean -- and let me be very frank with  
15 you. It never got examined in the previous MDL. And as I  
16 explained, and as you well know, I had great frustration  
17 because of attorneys --

18 MR. FRANKOVITCH: Right.

19 THE COURT: -- who completely abandoned their  
20 clients. And there we are doling out 100-dollar bills under  
21 circumstances which it just was not appropriate. So, you  
22 know where I'm coming from.

23 MR. FRANKOVITCH: Oh, I understand, I understand  
24 your frustration. I, I share in it. And, and -- but I  
25 think the process is people will reflect on what they have

1 and they'll -- I mean, if somebody doesn't have a good case,  
2 they're not going to expend a lot of efforts and time of the  
3 Court or defense in chasing the case.

4 THE COURT: Well, so, what -- answer my question  
5 now. When should it be done? Let me give you a little  
6 background.

7 MR. FRANKOVITCH: Okay.

8 THE COURT: I mean, every time a case is filed, it  
9 involves a lot of resources from the courts.

10 MR. FRANKOVITCH: Sure.

11 THE COURT: Every time a case is filed, it  
12 involves a lot of resources from the defendants. And it  
13 increases the cost to the Plaintiff Steering Committee and,  
14 and all of the resources which are devoted to this.

15 It seems to me that the MDL system and mass tort system  
16 is a marvelous procedure for dealing with large numbers of  
17 cases which may well have merit. And it is a -- if we put  
18 off the frivolous screening process until somewhere down the  
19 road or decide not to do it at all, we've already spent a  
20 lot of money on a bunch of cases that shouldn't have been  
21 filed in the first place.

22 And there really isn't any accountability to those  
23 attorneys that they should have to understand that there is  
24 no financial incentive to ever bringing a case as to which  
25 they don't have a good faith factual basis to believe it has

1 merit.

2 MR. FRANKOVITCH: I, I don't disagree with that.  
3 I really don't. And I think the, the process is somewhat  
4 designed to flesh that out when you have the plaintiff fact  
5 sheets that have to be filled out. And, and I don't know if  
6 these people filed plaintiff fact sheets or not, these 39.  
7 But if they had, had not, they would be subject to dismissal  
8 and they could be addressed as far as Rule 11 at that time.

9 The same is true with the medical records, on obtaining  
10 the medical records. If they -- ultimately if they, medical  
11 records show that there's no case, the case gets disposed of  
12 and is subject to Rule 11 sanctions.

13 THE COURT: But why should RecordTrak and the  
14 Plaintiffs' Steering Committee and the defense attorneys  
15 spend a bunch of money to do that when it really, under Rule  
16 11, is the obligation of the plaintiff's attorney to do it  
17 in the first instance and to say, very frankly, to the  
18 client, "I don't think you've got a claim."

19 MR. FRANKOVITCH: That -- an attorney who is doing  
20 this that knows what he's doing and doing it economically  
21 would do that. They'd say, "There's no reason to file this  
22 claim. You sit out here and see how this case develops.  
23 You don't need to jump in here and file this." I, I don't  
24 disagree with that.

25 I think the, the issue is when you, you make this

1 decision and when you, you do the discovery because it takes  
2 discovery to do that because you could have many instances  
3 of where people have other, besides the statute of  
4 limitations issue, of why the case was filed at the time it  
5 was filed.

6 THE COURT: Anything else you'd like to talk to me  
7 about?

8 MR. FRANKOVITCH: No, I don't think so, Your  
9 Honor.

10 THE COURT: You've made a nice presentation, Mr.  
11 Frankovitch.

12 Who wants to speak for the defense?

13 MR. MORIARTY: I think I can be brief.

14 We don't look at an MDL in the same philosophical light  
15 as Plaintiffs' Steering Committee. The cases are  
16 consolidated for discovery, certainly, but not just  
17 discovery on bellwether cases, or whatever you wish to call  
18 them. It's done as a vehicle for efficiency, cost  
19 containment, and judicial resource conservation.

20 PTO 16 and PTO 22 were negotiated. Okay? They had  
21 their say in what went in and did not go in. The defendants  
22 have to keep this entire portfolio of cases in mind. We  
23 cannot be myopic. We can't afford to be myopic and look  
24 only at the 10 trial cases for a number of reasons.

25 As you've already pointed out, there are lawyers in

1 Cleveland at Tucker Ellis, in Kansas City at Shook Hardy who  
2 have to spend the time to actually look at these things.  
3 The stacks of bills on my desk from RecordTrak, it's  
4 incredible how much it costs us to go out and obtain medical  
5 records on each and every one of these plaintiffs. So, it's  
6 important to contain these things now.

7 And if we can whittle down the portfolio of these cases  
8 in the MDL and in the state litigations to the cases that  
9 are really meaningful, that's what should be done. And it  
10 should be done now, not later when they are weeded out when  
11 money is expended.

12 Your Honor, I can tell you that this is actually the  
13 tip of the iceberg because we chose the 39 cases in which  
14 the plaintiffs, along with their PFS, gave us nothing,  
15 nothing except the authorizations. Okay? And they were  
16 obligated, if they had things in their possession, to  
17 produce them to us.

18 We didn't propound these Requests for Admissions on the  
19 people who only sent a death certificate or only a  
20 photograph of their tablet file. Okay? We'll get to those  
21 cases later.

22 This is -- we have to do this now. It's costing  
23 everybody too much time, too much money, and we should be  
24 able to focus our time and attention on the cases that  
25 matter.

1 I think in the wake of the recall, the rush to file a  
2 flood of lawsuits was there. It's a feeding frenzy and the  
3 plaintiffs' attorneys want to be not only in on the frenzy,  
4 but they want to be at the top of the food chain.

5 And I hate to get all philosophical on you, but that's  
6 not what our justice system is supposed to be. Rule 11  
7 exists. It's not suspended in an MDL. It hasn't been  
8 suspended by any negotiated order of this court or any  
9 unilateral order of this court. And it ought to be  
10 enforced.

11 And we need the tools, whatever they may be, because we  
12 don't have an established screening system, we need whatever  
13 tools are available under the Federal Rules of Civil  
14 Procedure to get where we need to be so far as weeding them  
15 out immediately.

16 The plaintiffs should not be able to file a case and  
17 hide it in a crowd hoping that they're not noticed and, as  
18 you say, at the end of the day be there with their hand out.  
19 That's not, that's not what this is all about. It's not  
20 just, it's not fair, and it's not economical.

21 Thank you.

22 THE COURT: Mr. Frankovitch.

23 MR. FRANKOVITCH: Just briefly, Your Honor.

24 Mr. Moriarty is correct. This was a negotiated item  
25 that we talked about where they would go and get these,

1 these medical records. And that's one of the issues that  
2 people relied on because the arrangement was, "If you have  
3 medical records, send them in. If you don't, we'll go get  
4 them." It wasn't like, "We're going to file Rule 11," or  
5 anything like that. "We will go and get it and we'll, you  
6 will pay a nominal fee for us having to go get the records."

7 And many people, and I don't know whether it includes  
8 these 39 or not, but I know from past experience that if you  
9 give them -- I'm saying "them" -- defendants collectively,  
10 generically, if you give defendants a medical authorization  
11 and you give them medical records, they'll go get the  
12 medical records. They're not going to rely on the ones you  
13 give them. They think plaintiffs edit them before they,  
14 they submit them, so they go and get new sets.

15 So, it's not like they were put at a, an undue burden  
16 because I'm sure that even the ones, the people that  
17 submitted records, they went and, and got those same medical  
18 records again.

19 THE COURT: Well, the plaintiffs' fact sheets and  
20 medical records have been front and center in this  
21 litigation since the very first hearing, and I expressed my  
22 concern about it right then.

23 MR. FRANKOVITCH: Right.

24 THE COURT: Whether or not the defendants get the  
25 medical records, there certainly are lots of provisions in

1 Pre-Trial Order 16 which put the burden on the plaintiffs to  
2 produce everything that they have. And my understanding of  
3 Rule 11 is that there is a burden on the plaintiff's  
4 attorney to determine whether there's a factual basis for  
5 the claim.

6 After the case is filed and it starts going through  
7 discovery and the acquisition of medical records, I  
8 certainly understand why the defense, for want of a better  
9 term, doesn't trust that the plaintiff will produce  
10 absolutely every medical record that's appropriate.

11 I want to go through each and every argument that has  
12 been raised to make sure that anything that the parties have  
13 to say about this matter has been brought forward.

14 We've certainly discussed timeliness. Now, the  
15 plaintiffs have suggested this is a circumvention of the  
16 deficiency process. I don't read it that way.

17 You know, I believe that this talks -- that this  
18 discovery is aimed toward the initiation of the lawsuit and  
19 not subsequent deficiency concerns about the plaintiffs'  
20 fact sheet. But I'll be glad to hear anybody's comments  
21 about that matter.

22 MR. FRANKOVITCH: Well, the only thing that I  
23 could say on that is it's, it may be ultimately appropriate  
24 in looking at something retrospectively Rule 11, but I don't  
25 think -- and, well, maybe that will become the new

1 requirement, that nobody can file a case without having  
2 medical records first as a prerequisite for litigation, in  
3 mass torts at least.

4 THE COURT: You may be reading my comments too  
5 narrowly. I'm not saying that they absolutely have to have  
6 medical records. As you say, if it's the eve of the  
7 expiration of the statute, you may not be able to do that.

8 But if Rule 11 applies, then the issue is what is, what  
9 is the expectation of the plaintiff's attorney under the  
10 circumstances to establish that they actually have a claim.  
11 That's, that's the --

12 MR. FRANKOVITCH: But don't you think that you  
13 have to make that determination after the ultimate  
14 disposition of the case?

15 THE COURT: Well, that means that we've spent an  
16 awful lot of money -- if the case turns out to be frivolous,  
17 then we've spent an awful lot of money to find out that a  
18 case is frivolous.

19 MR. FRANKOVITCH: Right.

20 THE COURT: And my point is, shouldn't we have  
21 placed the responsibility and the burden on the plaintiff's  
22 attorney to determine whether or not the case is frivolous  
23 at the front end before everybody else spends a whole lot of  
24 money on the case?

25 MR. FRANKOVITCH: I, I think that's true. But, as

1     you know, there's, there's cases that at the end of the day  
2     you win. There's, you know, some you lose.

3                 THE COURT: Oh, absolutely. Even the best lawyers  
4     with the best claims sometimes lose.

5                 MR. FRANKOVITCH: Oftentimes.

6                 THE COURT: And it doesn't mean that the, that it  
7     wasn't a meritorious case. And I think we all recognize  
8     that, yes. You wouldn't believe how many guilty people were  
9     found innocent by a jury when I was prosecuting. It's just  
10    shocking.

11                MR. FRANKOVITCH: I'm sure of that. More, more  
12    that way than the other way too I think. But the, the -- I  
13    think from the plaintiffs' perspective, they ought to have  
14    an opportunity to reflect on this before the Court does  
15    something dramatic and let those that think they have less  
16    than meritorious cases an opportunity to get out.

17                THE COURT: Well, of course, Rule 11 does provide  
18    the safe harbor, and I'm sure the defendants would comply  
19    with its provisions.

20                Now, we've talked a little bit about satellite  
21    litigation. I have read all of those cases, the Advisory  
22    Committee notes, and other scholarly materials. And I'm  
23    sure you've all realized there's not much on this.

24                However, the one -- the famous quote in the 1983  
25    Advisory Committee notes about whether or not this should

1 spawn satellite litigation has been referenced in cases in  
2 which a Rule 11 motion has already been filed. In other  
3 words, it appears that the conduct occurred. The, the one  
4 side has said, "You've committed a Rule 11 violation. It  
5 appears to be pretty apparent on the record."

6 And then the accuser wants to engage in a whole bunch  
7 of discovery about the circumstances of that particular  
8 violation, not whether there was a problem in the first  
9 instance.

10 And, so, if you have some authority or some good  
11 arguments to make which would suggest that my analysis of  
12 that particular quotation and that section of the Advisory  
13 Committee notes is in error, I would like to hear it.

14 MR. FRANKOVITCH: No, I don't think it's in error,  
15 Your Honor. It's, it's, it -- on a -- and I think the, the  
16 defendants would agree if this was an individual case, I  
17 think we'd probably be past this.

18 The issue is whether they should open this up --  
19 because it does become a collateral issue that you have to  
20 go down to determine what other issues that the plaintiffs  
21 knew about when they filed the case. So, it will, it will  
22 open that door, or could open that door to this collateral  
23 issue.

24 THE COURT: Well, thank you.

25 Does the defense wish to add anything?

1           MR. MORIARTY: Not from the Actavis defendants,  
2 Your Honor.

3           MR. KAPLAN: Your Honor, I think it's been said  
4 very appropriately and succinctly, but this really is all  
5 about whether there's a good faith basis to file a lawsuit.  
6 And now is the time to deal with it in a very short and  
7 simple way.

8           We, we're judicious about which cases we filed in.  
9 There is a Rule 11 safe harbor, as you noted, Your Honor.  
10 And I believe that a ruling that affirms the viability of  
11 Rule 11 in the mass tort setting will send a notice to  
12 plaintiffs who did not have viable cases or a good faith  
13 basis upon which to file them to dismiss those cases. And I  
14 think that's what will occur.

15           THE COURT: Mr. Frankovitch, do you want to have  
16 the last word?

17           MR. FRANKOVITCH: Well, I, I'm trying to see how  
18 we might couch this to get the message across whether it's,  
19 you know, the Court has an inclination to, to address these  
20 in a certain way and give everybody a chance to walk away if  
21 that's where they want to go.

22           THE COURT: Well, Rule 36(a)(6) says that the  
23 requesting party may move to determine the sufficiency of an  
24 objection, and that unless the Court finds an objection  
25 justified, it must order that an answer be served.

1           And I think it's plain to you that I am going to find  
2   that the objections are not justified, and I will order that  
3   answers be served. We're in a funny situation because  
4   these, the parties who actually got served with the Requests  
5   for Admissions aren't the ones who are before the Court I  
6   believe.

7           MR. FRANKOVITCH: That's correct.

8           THE COURT: And that brings me to another thing.  
9   It would be my expectation that the requests would be  
10  answered without an objection because we had that. We're  
11  over that.

12          And, so, they filed their response and then, and only  
13   then, if the defense believed that the record establishes a  
14   Rule 11 violation, then the defense has to file a motion and  
15   use the safe harbor provision.

16          If the plaintiffs don't answer the Requests for  
17   Admission, then we go over to Rule 37 which, of course,  
18   addresses that.

19          So, Judge Goodwin has already indicated to you that we  
20   have concerns about attorney accountability.

21          And you've made a fine presentation today, Mr.  
22   Frankovitch, given that it really wasn't your dog that was  
23   in the fight. And it's an awkward situation.

24          Let me just say that if there are any instances in  
25   which during the course of discovery from here on out that

1 lead counsel for the plaintiffs or for the -- I think it  
2 probably doesn't apply to the defendants. But if any lead  
3 counsel for the plaintiffs determines that you are not  
4 comfortable and believe that the position that other  
5 plaintiffs' attorneys want you to espouse is not  
6 substantially justified, then the Court will certainly hear  
7 from that attorney who does wish to make that argument.

8 But I will say at this point that I have grumbled about  
9 the number of discovery disputes in this case. Now, perhaps  
10 I don't have any idea how many there could have been. And  
11 it may be that you-all have done a fabulous job of working  
12 together. You've certainly done well in producing orders  
13 together.

14 However, the defendants' position on the plaintiffs'  
15 desire to conduct *ex parte* interviews of former Actavis  
16 employees in my view is not substantially justified. And,  
17 in my view, the plaintiffs' position with respect to the  
18 sufficiency of the objections to these Requests for  
19 Admissions also are not substantially justified.

20 The -- if this was just an individual case, I would  
21 have followed Rule 37 and tagged the offending lawyer with  
22 costs and fees. I don't have any problem doing that. I've  
23 been on the bench too long to put up with taking up a lot of  
24 my time writing memos when the law is clearly established  
25 and the positions, at least in my view, are not

1 substantially justified.

2 So, basically, you've each gotten your first bite. So,  
3 I'm not assessing costs and fees at this point, don't expect  
4 to. But I do want everyone to understand that it's not  
5 appropriate to say "no" just because it's the other side  
6 that's asking. And I will -- I'm certainly prepared to use  
7 Rule 37 in discovery disputes as needed in the future.

8 Now, I'm trying to figure if I've covered everything.  
9 Anybody have anything they want to say?

10 (No Response)

11 THE COURT: I'm sure that the Court's comments  
12 will be distributed and parties will take such action as  
13 they deem appropriate under the circumstances.

14 I'm going out of town for a few days. I don't know if  
15 I'll get the order out before I go, but at least you know  
16 what the expectation is.

17 Anything further?

18 MR. BELL: Nothing further, Your Honor.

19 MR. MORIARTY: Thank you.

20 THE COURT: Thank you.

21 (Proceedings concluded at 10:40 a.m.)

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1 I, Lisa A. Cook, Official Reporter of the United  
2 States District Court for the Southern District of West  
3 Virginia, do hereby certify that the foregoing is a true and  
4 correct transcript, to the best of my ability, from the  
5 record of proceedings in the above-entitled matter.

6

7

8 s\Lisa A. Cook

August 12, 2009

9 Reporter

Date

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